

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 1, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: DANIEL RAMON MUNOZ,

Movant.

No. 16-2160
(D.C. Nos. 2:09-CR-02968-RB-4 &
1:13-CV-00052-RB-RHS)
(D. N.M.)

ORDER

Before **BRISCOE**, **GORSUCH**, and **BACHARACH**, Circuit Judges.

Movant Daniel Ramon Munoz, a federal prisoner proceeding through counsel, seeks an order authorizing him to file a second or successive 28 U.S.C. § 2255 motion in the district court so he may assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).¹ Because Movant has made a prima facie showing that he satisfies the relevant conditions for authorization under § 2255(h)(2), we grant authorization.

Movant received a sentence enhanced under the guideline for career offenders, which is triggered by the defendant having “two prior qualifying felony convictions of either a crime of violence or a controlled substance offense,” U.S. Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n). He alleges that at least one of his prior convictions qualified for this purpose by virtue of the residual clause in the guideline’s

¹ Pursuant to 18 U.S.C. § 3006A, Mary Stillinger is appointed as counsel for Daniel Ramon Munoz effective nunc pro tunc to the date the request for authorization to file a second or successive § 2255 motion was filed in this court.

definition of a crime of violence, which encompasses crimes that “involve[] conduct that presents a serious potential risk of physical injury to another,” *id.* § 4B1.2(a)(2). An identical clause in the Armed Career Criminal Act was invalidated in *Johnson* on the ground that it was unconstitutionally vague.

To obtain authorization, Movant must make a prima facie showing that his claim meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see Case v. Hatch*, 731 F.3d 1015, 1028–29 (10th Cir. 2013). A claim may be authorized under § 2255(h)(2) if it relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Johnson* announced a new rule of constitutional law that was made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). We held in *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016) (per curiam), that second or successive § 2255 motions that rely on *Johnson* to challenge the career offender guideline qualify for authorization under § 2255(h)(2).

The motion for authorization filed in this court on June 28, 2016, is granted. We note that it appears Movant filed a § 2255 motion in the district court raising a claim based on *Johnson* on June 27, 2016, which the district court stayed pending our

disposition of Movant's motion for authorization. The district court now has authorization to consider that motion.²

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal line extending to the right.

ELISABETH A. SHUMAKER, Clerk

² Our authorization to file the successive motion does not speak to the timeliness of the authorized § 2255 motion. Timeliness is a merits determination that is outside the scope of our gatekeeping inquiry under the relevant statutes. *See Ochoa v. Sirmons*, 485 F.3d 538, 541-42 (10th Cir. 2007) (per curiam) (appellate court's gatekeeping role does not include even preliminary merits assessment); *In re Rains*, 659 F.3d 1274, 1275 (10th Cir. 2011) (per curiam) (timeliness of a habeas petition is a merits determination).